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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

70-346

No. 1966—

GEO. A. CLARK & SON, INC., a corporation
Petitioner,

-vs.-

F.W. NOLD and HELEN A. NOLD,
Respondents

ON PETITION for WRIT of CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING of the PETITION FOR A WRIT of CERTIORARI

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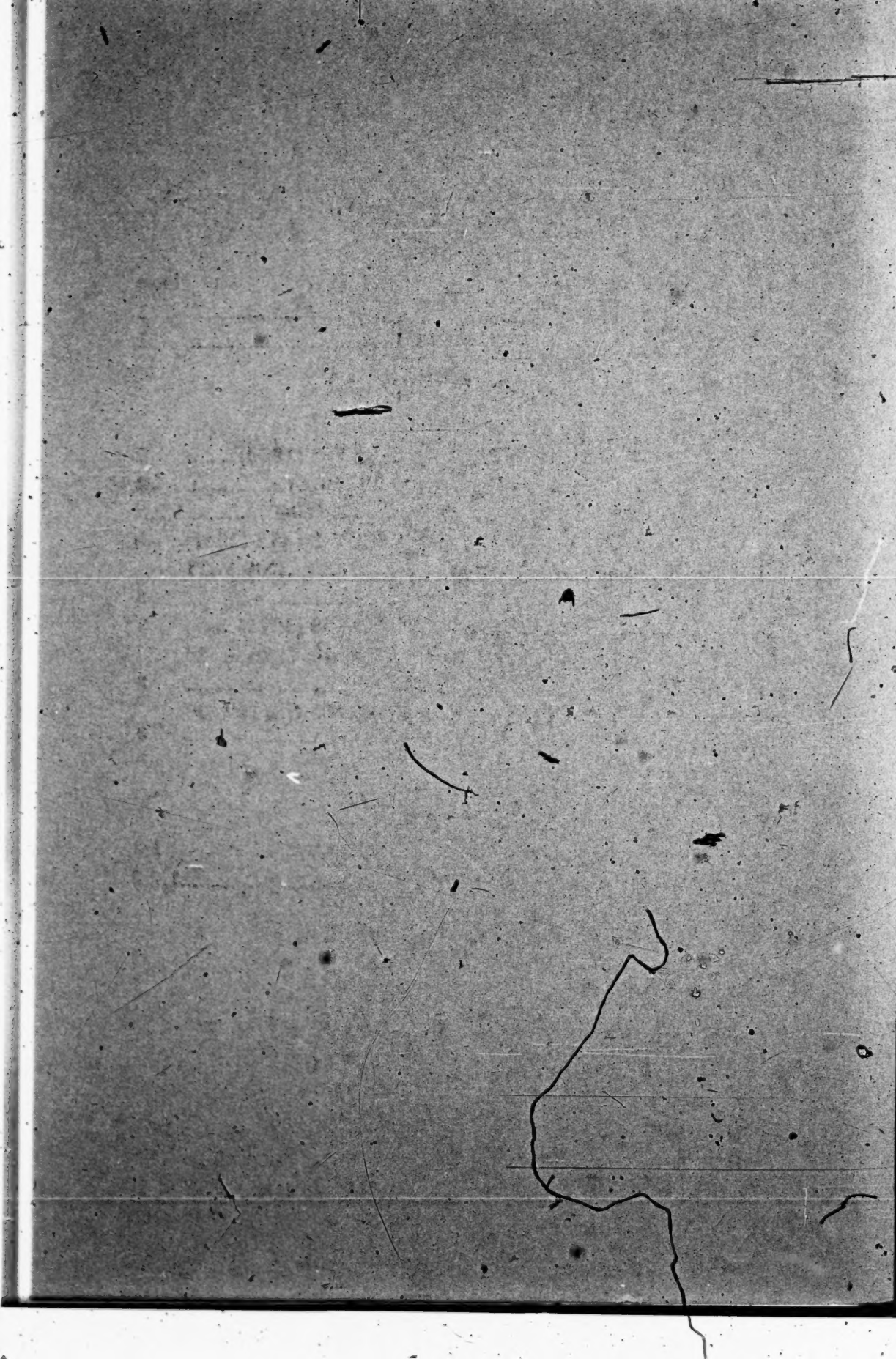

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 1893

GEO. A. CLARK & SON, INC., a corporation

Petitioner,

-vs.-

F.W. NOLD and HELEN A. NOLD,

Respondents

ON PETITION for WRIT of CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING of the PETITION FOR A WRIT of CERTIORARI

STATUTE INVOLVED

11 U.S.C. 107 (a)(1) (Section 67(a) of the 1938 Amendment to the Bankruptcy Act is substantially identical to Sec. 67(f) of the Bankruptcy Act of 1898.)

REASONS FOR DENYING THE WRIT

This is a controversy concerning a federal bankruptcy statute, 11 U.S.C. Sec. 107(a)(1), the interpretation of which by the court below is consistent with the decision of this court in *Fischer v. Pauline Oil & Gas Co.*, 309 U.S. 294, 60 S.Ct. 535, 84 L.Ed. 764 (1940), and there is no reason to redetermine the meaning of that decision.

The Respondents contention, adopted by the majority of the South Dakota Supreme Court and in harmony with the decisions in the area, is that, as purchasers claiming under the Trustee, the Respondents are proper parties to invoke the proscription of Sec. 107(a)(1) and avoid the liens. *Fischer v. Pauline Oil & Gas Co.*, supra; *Finney v. Knapp*, 145 Ga. 400, 89 S.E. 413 (1916); *Branch v. Human*, 215 Ga. 209, 109 S.E. 2d 732 (1959).

In Finney v. Knapp, supra, the facts of which materially coincide with the case at bar, the Georgia Supreme Court stated:

> "There is a difference between preserving the lien of a Judgment and declaring that the debt is not discharged if it is not scheduled and the creditor has no notice or knowledge of the proceedings. A debt due to a creditor may be preserved, but the lien of the Judgment rendered within four (4) months of the commencement of the bankruptcy proceeding, and while the bankrupt is insolvent, may nevertheless be destroyed. The two things are not necessarily inconsistent . . . Whether the judgment fixed the debt as a debt of record is not now in question. The lien on the property of the bankrupt was lost, and the purchasers at the Trustee's Sale took the property free from it." 145 Ga. 400, ---------, 89 S.E. 413, 414 (1916).

Petitioner contends that the decision of the *Finney* case is inapposite since the court proceeded under the theory that 67f of the Bankruptcy Act of 1898, now codified at 11 U.S.C. Sec. 107(a)(1), operated automatically to void the liens proscribed therein, a position no longer recognized.

Nevertheless, the *Finney* case is still good precedent. Had the case been litigated today and the insolvency been proved, as now required by judicial decision, the result would be the same. The *Finney* case assumed the insolvency; Respondent's in the case at bar proved it, and by doing so retained the protection of Sec. 107(a)(1), to wit: the section avoids liens as against anyone

claiming under the Trustee and Respondents, as purchasers from the Trustee, are claiming under him.

In *Fischer v. Pauline Oil & Gas Co.*, 309 U.S. 294, 60 S.Ct. 535, 84 L. Ed. 764 (1940), Mr. Justice Roberts, speaking for the Court, stated:

> "Although Sec. 67, sub. f, unequivocally declares that the lien shall be deemed null and void, and the property affected by it shall be deemed wholly discharged and released, *the section makes it clear that this is so only under specified conditions.* At the date of creation of the lien the bankrupt must have been insolvent; the lien must have been acquired within four months of the filing of the petition in bankruptcy; and the property affected must not have been sold to a bona fide purchaser . . . . *These conditions create issues of fact* which, as between the trustee, *or one claiming under him*, and the lienor, or one claiming by virtue of the lien, the parties are entitled to have determined judicially." 309 U.S. 294, 302 (1940) (emphasis added).

As found by the trial court, Stanley Vetos, the Bankrupt herein, was in fact insolvent on the date the Petitioner filed its Attachment Lien (Petitioner's brief, p. 27, No. 6); The lien was obtained within four (4) months of the filing of the Petition in Bankruptcy by Vetos (Petitioner's brief, p. 26, no. s 3,4); and the property was not sold to a bona fide purchaser pursuant to any proceedings under the Attachment Lien. Rather, the property was sold *by the Trustee* to the Respondents.

Quoting exerpts from the *Fischer* case, the Supreme Court of the State of South Dakota upheld these findings by the trial court, and concluded: "Our holding is in harmony with these expressions."

Petitioner cites *Grimbalis v. Linfair, Inc.*, 126 N.J.L. 82, 18 A.2d 412 (1941); *Kobrin v. Drazin*, 97 N.J. Eq. 400, 128 A. 796 (1925); *In re Graves' Estate*, 27 F. Supp. 717, 41 A.B.R. (N.S.) 371 (D.C.W.D. Ky. 1939); *Kruger v. Harper Realty Corp.*, 11 N.J. Super. 552, 78 A.2d 621 (1951); and *Morris Plan Bank of Georgia v. Simmons*, 201 Ga. 157, 39 S.E. 2d 166

(1946), to support the contention that only the Trustee may invalidate the lien. The South Dakota Supreme Court found however, and rightly so, that all of these cases were factually distinguishable from the case at bar and that "[n]one of them involved a purchaser of property for value from the trustee."

Petitioner argues that if the decision of the South Dakota Supreme Court is allowed to stand, "there would be no benefit to creditors." The purpose of the statute, however, is to prohibit one creditor from gaining an advantage or being preferred over other creditors. To allow Petitioner's lien to stand would, in the words of the South Dakota Court, "be inequitable and in effect prefer the appellant as a creditor of the bankrupt."

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for a Writ of Certioriari be denied.

Respectfully submitted,

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